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No. CIV-81-1096-T

In The United States District Court for the Western District of Oklahoma

EVERETT E. HODGES, III,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

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SUPPLEMENTAL APPENDIX

No. CIV-81-1096-T

In The
United States District Court for the
Western District of Oklahoma

EVERETT HODGES, III,
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vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Everett E. Hodges, III, initiated this suit against the defendant Atchison, Topeka and Santa Fe Railway Company seeking to recover damages for breach of an employment contract. Plaintiff alleges that the defendant entered into contracts with the U. S. Government which provided, pursuant to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793[1], that the defendant would not discriminate against individuals because they are handicapped. Plaintiff asserts that these contract provisions and defendant's personnel policy statements regarding its handicapped affirmative action practices were incorporated by implication into

[1] 29 U.S.C. § 793 provides in pertinent part as follows:

"(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title..."

plaintiff's individual employment contract with the defendant. These terms and thus, the contract, were breached, plaintiff contends, when the defendant terminated plaintiff's employment because he was a qualified handicapped individual.

Defendant has filed a Motion for Summary Judgment contending that plaintiff's suit may not be premised on Section 503 of the Rehabilitation Act as that section does not create a private cause of action and that under Section 3 of the Railway Labor Act (RLA), 45 U.S.C. §§ 151, et seq.,[2] the National Labor Railroad Readjustment Board has primary and exclusive jurisdiction over plaintiff's breach of employment contract claim. In response, plaintiff argues that Section 503 of the Rehabilitation Act of 1973 impliedly authorizes a private suit for damages in federal court but that if it does not, plaintiff is entitled to recover as a third party beneficiary of the defendant's contracts with the United States. In addition, plaintiff maintains that the affirmative action mandates of Section 503 are required by 41 C.F.R. § 60-741.6(g)(1) to be included within the employer's policy manual which, under Oklahoma law, forms a part of the employee's contract and, if not followed, creates a cause of action for breach of contract. As a final basis for recovery plaintiff asserts that defendant circulated an affirmative action policy statement and consequently should be

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[2] The Railway Labor Act (RLA) sets up mandatory procedures for the resolution of "minor" and "major" disputes. Plaintiff's wrongful discharge claim constitutes a "minor" dispute within the meaning of 45 U.S.C. § 153 First (i). *Andrews v. Louisville & Nashville R. Co.*, 406 U.S 320 (1972). ("The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances... (t)he very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union." Supra at 323-324); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978).

bound by and liable for its failure to abide by the statement's terms.[3]

With respect to defendant's proposition that the RLA provides plaintiff's exclusive remedy, plaintiff maintains that the Act does not bar his Section 503 claim as the exclusive remedy rule does not preclude causes of action brought under other federal statutes. The RLA also does not bar his breach of contract claim, plaintiff contends, because he was not a member of any union and the union's failure to timely inform him of the grievance procedure and to process his grievance relieved him of any obligation he had to submit to arbitration under the Act.

Neither party contends that a genuine issue as to any material fact exists to preclude the entry of summary judgment and, as none is present, summary judgment is appropriate. Fed.R.Civ.P. 56; *Mustang Fuel Corp. v. Youngstown Sheet & Tube*, 561 F.2d 202 (10th Cir. 1977). The Court concludes, having reviewed the authorities relied upon by the parties, the briefs, and the other evidence submitted, that plaintiff may not premise a claim on Section 503 of the Rehabilitation Act and that it lacks subject matter jurisdiction over plaintiff's breach of contract claim. The reasons for the decision follow.

Although some district courts have held that Section 503 of the Rehabilitation Act impliedly authorizes a private cause of action for damages resulting from the discriminatory conduct of federal contractors, e.g. *California Paralyzed Veterans Ass'n. v. F.C.C.*, 496 F. Supp. 125 (C.D. Cal. 1980), all of the Courts of Appeal that have addressed the issue have held that Section 503 does not create a private judicial remedy. *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2nd Cir. 1981), cert. denied, ____ U.S. ____ (1982); *Simon v. St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), cert. denied ____ U.S. ____ (1982); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), cert. denied, 449 U.S.

[3] This theory of recovery is treated as another variation of plaintiff's breach of contract claim which serves, along with plaintiff's claim based on an alleged violation of Section 503 of the Rehabilitation Act as the bases for plaintiff's suit.

889 (1980); and *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979). In accord with these persuasive decisions, see *Rogers v. Frito-Lay*, supra, for a well-reasoned, exhaustive analysis of the issue, the Court finds that Section 503 does not create a private cause of action and may not serve as the basis for plaintiff's suit. This determination also disposes of plaintiff's third party beneficiary theory as it is, in essence, an indirect, unavailing attempt to predicate the action on Section 503.

To withstand defendant's motion regarding his remaining breach of contract or wrongful discharge claim, plaintiff must establish a justifiable excuse for his failure to follow the arbitration proceedings established by the RLA, which are mandatory under the Supreme Court decision of *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). Accord *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978). Plaintiff's argument that he was not a union member and thus not the beneficiary of any collective bargaining agreement is not convincing. The union representing a class or craft of railway employees represents all the employees within the craft or class regardless of their status as union members, and all employees share in the rights secured by the collective bargaining agreement negotiated by the union.[4] *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944). Plaintiff's position that the union's failure to timely inform him of the grievance procedure and refusal to process his claim relieved him of the obligation to proceed under the RLA does merit discussion.

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[4] Although plaintiff continually refers to his *unproduced* employment contract with the defendant and certain rights that he alleges arise from it, the terms and conditions of his employment were governed by the collective bargaining agreement covering yardmen. In addition, the remedy available to plaintiff under the Railway Labor Act eliminates plaintiff's Fifth Amendment claim, and his Seventh Amendment jury trial argument has been conclusively rejected by several courts. See *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 370 F.2d 833 (10th Cir. 1966), cert. denied, 386 U.S. 1018 (1967); *Magnuson v. Burlington Northern, Inc.*, 413 F. Supp. 870 (D. Mont. 1976), aff'd, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978).

The Supreme Court has held that a railroad employee may be permitted to institute a federal suit against his employer and union despite his failure to exhaust fully his contractual remedies if the union acting in concert with the railroad employer breaches its duty of fair representation. *Glover v. St. Louis - S. F. R. Co.*, 393 U.S. 324 (1969). However, the Supreme Court has recognized but not resolved the question of whether the employee may sue the employer in district court or must resort to the Adjustment Board for a remedy when, as in the case before this Court, there are no allegations tying the union and employer together with respect to the union's alleged breach of its fair representation duty. *Czosk v. O'Mara*, 397 U.S. 25 (1970).[5] Defendant contends that malfeasance alone on the union's part, without collusion or conspiracy with the employer, does not confer jurisdiction on the court to entertain plaintiff's contractual claim and defendant also asserts that plaintiff's failure to name the union as a defendant is fatal to his suit.

This jurisdictional issue has been addressed by several courts and was recently presented to the Eighth Circuit in *Raus v. Brotherhood Ry. Carmen of U.S. and Canada*, 663 F.2d 791 (8th Cir. 1981), a case brought by railroad employees against their employer *and* union in which the plaintiffs alleged that the railroad breached the collective bargaining agreement by not permitting the plaintiffs to enter a training program and that the union violated its duty of fair representation by not pursuing their grievance. Relying on *Glover v. St. Louis-S. F. R. Co.*, supra,[6] the Court reasoned that the critical factor in determining whether a district court had jurisdiction over a railroad is whether the suit is essentially an action

[5] Suits by employees against their unions for a breach of the duty of fair representation do not fall under the provisions of the RLA and are not subject to the jurisdiction of the National Railroad Adjustment Board. *Czosek v. O'Mara*, 397 U.S. 25 (1970), *Conley v. Gibson*, 355 U.S. 41 (1957); *Raus v. Brotherhood Ry. Carmen of U.S. and Canada*, 663 F.2d 791 (8th Cir. 1981); *Richins v. Southern Pac. Co.*, 620 F.2d 761 (10th Cir. 1980).

[6] In *Glover* the Supreme Court held that the railroad employees' failure to exhaust their remedies under the collective bargaining agreement, the union constitution, and the Railway Labor Act did not mandate dismis-

between some employees *and* the union and management together, "whether there are well-plead allegations of something like collusion between the railroad and the union denying the employee(s) their rights under the contract and the Railway Labor Act." Supra at 798. Finding the complaint devoid of allegations or facts supporting allegations of collusion between the railroad and union, the Court held that the district court lacked subject matter jurisdiction over the railroad, but not over the plaintiffs' claim against the union. But see *Schum v. South Buffalo v. Railway Co.*, 496 F.2d 328 (2nd Cir. 1974); *Pratt v. United Air Lines, Inc.*, 468 F. Supp. 508 (N.D. Cal. 1978).

Notably, dismissal of the plaintiffs' claim against the railroad in *Raus* did not deprive the plaintiffs of a remedy as they could still maintain an action against the railroad before the Adjustment Board. 663 F.2d at 799 n. 15. To the contrary, it appears, though neither party has specifically addressed the point, that Hodge's claim before the Railroad Readjustment Board is time-barred, as he states in his brief that the attorneys for the union "failed to inform him in a *timely* manner as to the manner in which he could proceed with the filing of a grievance and refused to process his grievance."[7] Plaintiff's brief, page 6. A similar charge was made in *Richens v. Southern Pac. Co.*, 620 F.2d 761 (10th Cir. 1980), cert. denied, 449 U.S. 1110 (1981), a case relied upon by the Eighth Circuit in *Raus* that also dealt with the question of a district

[6] (Continued)
sal of their suit against their employer and union when the complaint alleged the railroad and union representatives had been acting in concert to discriminate against the employees. The language viewed as critical and decisive by the Eighth Circuit was "Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the 'dispute' is one between some employees on the one hand and the union and management together on the other, not one 'between an employee or group of employees and a carrier or carriers.'" *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 329, (1969).

[7] Even if the union refused to process his grievance plaintiff was not without a remedy as it appears he could have filed a claim on his own or with the assistance of counsel under the Act. Railway Labor Act, Section 153 First (j), 45 U.S.C. § 153 First (j).

court's jurisdiction over a union *and* railroad. The plaintiffs in *Richens* sued their employer, alleging that they were demoted and laid off in violation of the applicable collective bargaining agreement, and also sued their union, alleging it breached its duty of fair representation. Noting that the prayers for relief sought were not so easily separable as to warrant bifurcating the proceeding, that the plaintiffs could not secure full relief if the railroad was not a party as reinstatement with seniority was sought, and that the alleged facts were consistent with a pattern of collusion between the union and railroad, the Court held in that "hybrid"[8] case that jurisdiction existed over both defendants. However, although the court was aware of the plaintiffs' argument that if they were required to take their claims to the Board they could not secure any relief because the union's action prevented their filing of a timely claim, supra at 762 n.2, the Court unequivocally stated:

> "If this suit had been brought against the Railroad only, we would have no difficulty in determining the proper disposition. The dispute between plaintiffs and the Railroad is clearly a 'minor' one—that is, 'between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.' 45 U.S.C. § 153 First (i). As the Supreme Court has emphatically told us, 'Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.'" (citations omitted) Supra at 762.

Therefore, plaintiff's failure to join the union as a defendant and failure to allege that the defendant and his union acted in collusion preclude him under *Richens* and *Raus* from bringing suit directly against the defendant, his employer, without first exhaust-

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[8] The case was "hybrid" because it contained a breach of contract claim that usually was within the exclusive jurisdiction of the National Railway Adjustment Board and a breach of the duty of fair representation claim that was within the jurisdiction of the district court. See note 3 supra.

ing his administrative remedies.[9] Accord *Riddle v. TransWorld Airlines, Inc.*, 512 F. Supp. 75 (W.D. Mo. 1981).

Accordingly, the Court having determined that Section 503 of the Rehabilitation Act does not create a private cause of action and may not serve as the basis of plaintiff's suit, and that it lacks subject matter jurisdiction over plaintiff's breach of contract due to plaintiff's failure to follow the arbitration proceedings established by the Railway Labor Act, defendant's Motion for Summary Judgment shall be and is hereby granted.

IT IS SO ORDERED this 9th day of August, 1982.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

Filed Aug. 9, 1982
Herbert T. Hope, Clerk
U.S. District Court
s/By: Irene Higginbotham, Deputy

[9] Though unnecessary to discuss, based on the Court's ruling, it is questionable whether the plaintiff has even stated a colorable claim of breach of the duty of fair representation, as that occurs only when a union's conduct toward a member of the collective bargaining unit is discriminatory, arbitrary, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). A union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, *Vaca v. Sipes*, supra, but there must be substantial evidence of fraud, deceitful action or dishonest conduct." *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). See also *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981).